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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-665

UNITED STATES OF AMERICA, *Petitioner*

v.

STEPHEN PITCAIRN, *Agent for Shareholders of
Autogiro Company of America*

**MOTION OF BELL HELICOPTER TEXTRON FOR
LEAVE TO FILE A BRIEF AMICUS CURIAE IN
RESPONSE TO PETITION NO. 77-665, AND BRIEF
AMICUS CURIAE IN SUPPORT OF CERTIORARI**

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**MOTION OF BELL HELICOPTER TEXTRON FOR
LEAVE TO FILE A BRIEF AMICUS CURIAE IN
RESPONSE TO PETITION NO. 77-665**

Bell Helicopter Textron is one of the world's leading helicopter manufacturers, a major military contractor with the United States Government and the manufacturer of many of the helicopters which are the subject matter of this litigation. In some of the contracts for the procurement of these helicopters Bell agreed to indemnify the Government against possible patent infringement claims. While only one patent with respect to which Bell is an indemnitor was ultimately determined to be valid and infringed and the potential monetary liability of Bell as a direct result of this lawsuit is relatively limited, the adverse effect upon Bell as a Government contractor, and

upon all parties that may contract with the Government, will be substantial. In addition to the fiscal impact that this decision will have upon Government procurement, the decision below will seriously disrupt Government-Contractor relations and will interfere with the necessary expeditious handling of Government military contracts.

The Government, as it has shown in its Petition to this Court, is well situated to describe the inevitable abuses and inflationary consequences that will burden Government procurement as a result of the decision below. However, Bell, as a major military contractor, believes that the views it seeks to present on this matter will further assist to the Court in consideration of the Government's Petition for a Writ of Certiorari.

Bell respectfully requests this Court to permit it to file a brief amicus curiae which is submitted herewith.

The petitioner has consented to the filing of a brief amicus curiae. The respondent has refused to consent to the filing of a brief amicus curiae.

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No. 77-665

UNITED STATES OF AMERICA, *Petitioner*

v.

STEPHEN PITCAIRN, *Agent for Shareholders of
Autogiro Company of America, Respondent*

**BRIEF FOR BELL HELICOPTER TEXTRON AS
AMICUS CURIAE IN SUPPORT OF CERTIORARI**

OPINIONS BELOW

The opinion of the trial judge of the Court of Claims (see *Petition For A Writ of Certiorari* on behalf of United States Government, App. A, pp. 1a-31a) is not officially reported. The opinion of the Court of Claims (App. B, pp. 32a-108a), as amended on rehearing (App. C, pp. 109a-112a), is reported at 547 F. 2d 1106.¹

¹“App.” references are to Petitioner’s Appendices, attached to the Petition.

JURISDICTION

The Court of Claims announced its opinion with respect to the questions presented here on December 15, 1976, and denied both parties' motion for rehearing on March 4, 1977 (App. C, pp. 109a-112a). The final judgment of the Court of Claims was entered on July 12, 1977 (App. D, pp. 113a-115a), and the Petition for a Writ of Certiorari was filed on November 9, 1977.

QUESTION PRESENTED

Whether reasonable and entire compensation due to a patent holder as a result of the Government's use of his patents under 28 U.S.C. 1498 can be determined by industry-wide *unaccepted* offers of the patent holder.

STATUTE INVOLVED

28 U.S.C. 1498(a) provides in pertinent part:

Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall

be construed as use or manufacture for the United States.

INTEREST OF BELL HELICOPTER TEXTRON

Bell Helicopter Textron (Bell) is a major helicopter manufacturer, military contractor with the U.S. Government, and the manufacturer of many of the helicopters which are the subject matter of this litigation. In some of the contracts for the procurement of those helicopters Bell agreed to indemnify the Government against possible patent infringement claims. While only one patent with respect to which Bell is an indemnitor was determined to be valid and infringed and the amount of potential monetary liability to Bell directly resulting from this case will be relatively small, the adverse effect on Bell as a Government contractor, and upon all parties contracting with the Government, will be substantial.

STATEMENT

This lawsuit was initiated in the Court of Claims under 28 U.S.C. 1498 to recover reasonable compensation for the unauthorized manufacture and/or use by or for the United States of inventions covered by respondent's patents. At various times during the lawsuit respondent asserted that some thirty-two (32) patents were infringed by helicopters purchased by the Government. In 1964 the Trial Commissioner submitted 415 findings of fact on the 16 patents then remaining in the lawsuit. 384 F. 2d 391 at 401-403. In view of the extraordinarily large number of findings, the Government, in consultation with this indemnitor (Bell), selected those findings which involved

claims, and the helicopters to which they had been applied, that were considered to be of any possible substantial monetary value and elected to except to those findings with full supporting briefs and arguments. It was decided to except only generally to the remainder of the findings. All of the findings to which "full" exception (i.e. supported by briefs and arguments) had been taken were rejected by the Court. The other findings were adopted by the Court on the grounds that the exceptions to these findings were not properly taken. 384 F. 2d at 401, 402.

The Autogiro Company of America (Autogiro), dissolved in 1973, was a patent holding company founded and owned by Harold Pitcairn (Pitcairn). Throughout the 1930s and early 1940s Pitcairn, through various companies, attempted to develop a U.S. market for the autogiro.² Most of these efforts were unsuccessful as Pitcairn himself testified before the House Committee on Military Affairs in April of 1938 (DX 138, pp. 68-72).³

Just prior to the entry of the United States into the Second World War, the Government, spurred by developments in Germany in 1938, became interested in advancing the development of the powered rotary wing device, the helicopter. Developmental work was carried on in the early forties by two government con-

² Autogiros and helicopters are both rotary wing aircraft. However, a helicopter has a power driven rotor and a tail rotor and is capable of hovering in still air. On the other hand, an autogiro is drawn through the air by a nose-mounted propeller and cannot hover in still air, 384 F.2d at 401.

³ DX refers to Defendant's Exhibit in the liability phase of this action.

tractors, Platt-LePage and the Sikorsky Aircraft Division of United Aircraft. During the latter stages of the war, the Government purchased several hundred helicopters from United.

In 1941 Pitcairn sold his autogiro manufacturing business but retained his patent rights. Thereafter, his primary interest was in attempting to sell patent licenses to the rotary wing industry.

Prior to the war, Pitcairn had caused Autogiro to license himself and one other company, Kellett Autogiro, generally at 5% of the aircraft retail sale price. Those licenses allowed the licensee to use all of Autogiro's patents, as well as to receive any Autogiro technical data at cost without overhead. When Pitcairn sold his manufacturing facility in 1941, his successors-in-interest, first a company called G&A Aviation and later the Firestone Tire and Rubber Company, retained licenses similar to the one Pitcairn had sold to himself (App. B, p. 44a, n. 4).

During the war, as a result of the policy embodied in the Royalty Adjustment Act of 1942, the Government became indirectly involved in Autogiro's licensing policy. After a complex series of negotiations involving Autogiro, United (Sikorsky) and the Air Corps at Wright Field, a wartime-only license was agreed to exclusively for government-procurement at a royalty rate of 0.85% of the airframe price. The wartime licenses with United and Kellett automatically terminated six months after the cessation of hostilities (App. B, p. 45A, n. 5) and thus, after the war, Autogiro began a new round of negotiations with the helicopter manufacturers.

In March 1946, Firestone was again licensed, this time on a per patent basis at the rate of 10% of the retail value of the patented components (App. B, p. 44a, n. 4). Kellett did not take a license for post-war activities. In July 1945, Autogiro began negotiations with United (Sikorsky) for a post-war license. These ended in January 1947 when United accepted a license under all of Autogiro's patents with a royalty ceiling of \$500 per aircraft for the years 1947 and 1948 and a provision that unless United cancelled the license prior to January 1949 (App. B, pp. 45a-46a), the rate would then be increased to 2% of aircraft retail sale price.

Arguing that United had in effect agreed to a 2% royalty rate, Autogiro in 1947 offered a 2% license to the entire helicopter industry, including Bell (App. B, pp. 46A). Not one helicopter manufacturer would agree to that rate. In July, 1948, United timely announced its intention to cancel the license and the 2% rate never took effect (App. B, pp. 48a-49a, n. 11). In October 1948, Pitcairn offered to sell United all of his patent rights for the sum of \$750,000 (App. B, p. 95a). United refused and in early 1949, United and Autogiro entered into a paid up license covering all of Autogiro's patents (over 200) for the total sum of \$120,000.

The Government's expert witnesses testified as to the "reasonable and entire compensation" due respondent based on an extrapolation from the *actual* royalty rate paid by United during the period 1946-1949. He calculated that respondent was entitled to royalty compensation of \$830,377.22 (App. B, pp. 102a-106a, n. 3).

The trial judge refused to consider any transaction which occurred after November 1946, the date of first infringement by the Government (App. A, p. 15a). Ignoring the post-war transactions with the helicopter industry, the trial judge applied the royalty rate structure of some of respondent's pre-war licenses and found that the appropriate royalty compensation due respondent was \$24,570,525.

The Court of Claims overturned the trial judge's conclusion with respect to the immateriality of the post-war transactions but reduced the award to \$14,440,772. The Court arrived at this amount on the basis of the option provision of 2% in the United '47 license agreement although United had specifically refused to allow this rate to take effect in its letter of July 1948 and on which it had not paid one cent of royalty. This unimplemented 2% option provision of the 1947 license and rejected offers at 2% to others were the basis of the Court's determination of the market value of a license in plaintiff's patents. The royalty ceiling of \$500 per aircraft, the rejected offer to sell at \$750,000 and the \$120,000 paid up license were ignored by the Court of Claims because it viewed them as compromises of possible litigation (App. B, pp. 51a-52a).

Although the 2% rate never became effective, the Court considered that it was "highly probative" (App. B, p. 49a) of the value of the patents because "(respondent) proposed similar licenses to other major manufacturers of helicopters, in effect announcing its post-war rate to be 2%" and "made the offer and made it widely" (App. B, p. 46a).

REASONS FOR GRANTING THE WRIT

Bell agrees with the Government in its analysis of the pernicious influence which this case will have on future compensation cases under 28 U.S.C. 1498. It will increase beyond all reasonableness the amounts of judgments against the Government in patent infringement and eminent domain suits, as has occurred in this case in the decision below. Claimants in such suits against the Government will have it within their power to bypass the litmus test of marketplace acceptance and establish an arbitrary and excessive value of their patents by the simple expedient of rejected offers.

There is an additional factor that Bell believes strongly urges the Court's acceptance and consideration of this case. Under certain circumstances the Government is entitled to be indemnified for patent infringement, as would a private citizen under the Uniform Commercial Code. The vehicle for such indemnification of the Government, relating to military procurement, is the indemnity clause set forth in Section 7-104.5 of the Armed Services Procurement Regulation. When the sale involves commercially available goods, this clause is "mandatory" and must be included in a contract with the Government, as it was with respect to some of the helicopters purchased by the Government from Bell and others in the present case. Acceptance of the standard for "reasonable and entire compensation" established by the court below will compel contractors to refuse to accept indemnity clauses for there would be no means by which the Contractor could estimate the extent of his potential liability. Absent the "willing buyer-willing

seller" standard that is the accepted basis for determination of royalty rate as exemplified in *Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers, Inc.*, 318 F. Supp. 1116, modified 446 F. 2d 295 (2nd Cir., 1971) cert. den. 404 U.S. 870 (1971), no financially responsible Government contractor will accept the open-ended exposure that an indemnity clause would impose upon him. If a contractor were, under the pressure of business circumstances, forced to accept an indemnity clause he would necessarily assume outrageously high royalty rates for the patents in question and include such costs in his pricing. These costs would understandably and expectedly be rejected by the Government as not having been included within the commercial price for the article. Then, either the Contractor would have to assume a virtually open ended risk or the Government would have to accept excessive royalty rates as allowable costs, in violation of a Congressionally directed policy extending throughout all phases of Government procurement to conduct Government business at the maximum savings possible.*

The clearly inevitable result of the decision below will be to seriously disrupt Government-Contractor

* By the Armed Services Procurement Act of 1947 Congress mandated a policy of competitive procurement designed to encourage separate sources for standard commercial items and thus to obtain maximum cost savings to the Government, 10 U.S.C. 2301, et seq, *Paul v. United States*, 371 U.S. 245. Price analysis of all types of Government military contracts must be performed to determine that the price is reasonable (see ASPR 3-807.1 (2) (d)). A price is reasonable "if it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business (see ASPR 15-201.3 (a)).

relations and interfere with the necessary, expeditious handling of military contracts.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

GEORGE GALERSTEIN
Chief Legal Counsel
Bell Helicopter Textron

January 1978

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed three copies of the within Motion and Brief Amicus Curiae to the Petitioner and Respondent in the above docket.

GEORGE GALERSTEIN